

UNITED STATES COURT OF APPEALS September 18, 2008
FOR THE TENTH CIRCUIT Elisabeth A. Shumaker
Clerk of Court

In re:

RICKY LEON DORITY,

Movant.

No. 08-7073
(D.C. No. 6:08-CV-00279-FHS)
(E.D. Okla.)

ORDER

Before **TACHA**, **EBEL**, and **McCONNELL**, Circuit Judges.

Movant Ricky Leon Dority, a federal prisoner appearing pro se, has filed a motion seeking authorization to file a second or successive 28 U.S.C. § 2255 motion to vacate, set aside or correct his sentence. *See* 28 U.S.C. § 2255(h) (requiring prisoner to move in Circuit Court for order authorizing district court to consider second or successive motion). We deny authorization.

Mr. Dority was convicted in 1999 of being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e)(1) and (2). His conviction and sentence were affirmed on direct appeal. *United States v. Dority*, No. 99-7120, 2000 WL 676008, at *2 (10th Cir. May 24, 2000) (unpublished order and judgment). He filed a § 2255 motion in 2001, which was denied. We denied him a certificate of appealability. *United States v. Dority*,

42 F. App'x 301, 304 (10th Cir. 2002). In 2005, Mr. Dority attempted to file an unauthorized second or successive § 2255 motion. The district court transferred the matter to this court, and we denied authorization. *Dority v. United States*, No. 05-7075 (10th Cir. Jan. 17, 2006) (unpublished order).

In his most recent motion for authorization, Mr. Dority seeks to present a claim that the criminal firearm statutes under which he was convicted are unconstitutional under the Supreme Court's recent decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). In *Heller*, the Court held that the Second Amendment prohibits a complete ban on handgun possession in the home, *id.* at 2821-22, but noted that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," *id.* at 2816-17.

To obtain authorization to file a second or successive § 2255 motion, a federal prisoner must demonstrate that his proposed claims either depend on "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense," § 2255(h)(1), or rely upon "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," § 2255(h)(2). Mr. Dority argues that his claim is based on new evidence of the

Heller decision and that *Heller* is a new rule of constitutional law which should have retroactive effect.

Mr. Dority's proposed claim does not meet the requirements for authorization. Reliance on new law is not new evidence, and a new rule of constitutional law is made retroactive to cases on collateral review only when the Supreme Court *explicitly* holds that the rule it announced applies retroactively to such cases. *Tyler v. Cain*, 533 U.S. 656, 663 (2001). The Supreme Court has not made *Heller* retroactive to cases on collateral review.

Accordingly, authorization is DENIED and this matter is DISMISSED. This denial of authorization is not appealable and "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker".

ELISABETH A. SHUMAKER, Clerk